

IN THE MATTER OF THE ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION, LOCAL 1498,)	FEDERAL MEDIATION AND
)	CONCILIATION SERVICE
)	CASE NO. 07-58476
)	
)	
Union,)	
)	
and)	
)	
)	
JEFFERSON PARTNERS, L.P., D/B/A JEFFERSON LINES,)	DECISION AND AWARD
)	OF
Employer.)	ARBITRATOR

APPEARANCES

For the Union:

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For the Employer:

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On November 2, 2007, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Joseph M. Zeilbeck. The last of the parties' post-hearing written materials was received by the arbitrator on January 6, 2008.

FACTS

The Employer operates a scheduled passenger bus service in the central United States. The Union is the collective bargaining representative of the non-supervisory employees of the Employer who are classified as Motor Coach Operators ("Drivers") and Maintenance Employees.

The grievant was hired by the Employer on August 1, 2004, to work as a Driver. He worked in that classification until he was discharged on January 9, 2007.

The Employer maintains a system of hub terminals in the major cities it serves, where passengers may purchase tickets and board and leave buses. In addition, the Employer uses hundreds of stops along its routes -- at convenience stores, gas stations and other retail establishments, where passengers are picked up and dropped off. The parties refer to these stops as "agencies" and to the personnel who operate them as "agents." Passengers may buy tickets at some of these locations or by telephone and through the internet.

This is an unusual case in that the Union concedes that the Employer had justification to discharge the grievant under the substantive standard required for such action by the labor agreement. The Union, nevertheless, challenges the discharge, arguing that the Employer failed to follow the procedural requirements established by the labor agreement as a prerequisite to discharge.

The event that led immediately to the Employer's decision to discharge the grievant occurred on January 5, 2007. The grievant was driving a scheduled passenger bus on a route that

started at Grand Forks, North Dakota, and ended at Minneapolis, Minnesota. One of the stops on the route was at a Super America service station at Big Lake, Minnesota, about forty-five miles from Minneapolis. The grievant was discharged on January 9, 2007, for failing to follow the Employer's policies when he stopped at that Super America station on January 5, 2007. He drove his bus into the parking area in front of the service station building and left after 90 to 120 seconds, without getting out of the bus. He testified that he saw no cars parked there, that he looked through the service station windows and saw no one waiting in the booth where passengers usually wait for the bus, that he did not get off the bus to ask the clerk inside if there were any passengers to be picked up and that, because he thought there were no passengers, he drove off, continuing on his route to Minneapolis.

Thereafter, the clerk at the Big Lake Super America station called the Employer's operations personnel and reported that the grievant had driven off without picking up a waiting passenger. The Employer's policies require that, during hours when such an agency is open for business, Drivers get off the bus and check with the clerk inside to find out if there are passengers to be picked up. The grievant was discharged for the January 5, 2007, violation of this policy and for his poor record of previous discipline, which includes several warnings and suspensions.

As noted above, the Union concedes that the Employer had substantive justification to discharge the grievant, but it

asserts that the grievant should, nevertheless, be reinstated to his position because the Employer did not follow the procedures established by the labor agreement for the discharge of a bargaining unit employee.

The following provisions of the labor agreement are relevant to the parties' arguments about procedure:

ARTICLE 41

DISCIPLINE-SUSPENSION-DISCHARGE. Any member suspended or discharged and later through investigation or arbitration found not sufficiently guilty to warrant such suspension or discharge shall be reinstated in his former position with continuous seniority rights and will be paid for all lost time at his regular rate or such other remedy as which may be determined by the Arbitrator, provided complaint is filed by the Union within fifteen (15) workdays after the member received notice of the discipline complained of.

41.1. The member's record will be cleared of all such charges and will show no reference thereto, except as determined by the Arbitrator.

41.2. The Company agrees to notify each member in writing of the placing of anything against him or his record. An Employee shall have the right to inspect his personnel file, if requested in writing, no more than once every six months in the presence of the Employee's supervisor and one other management Employee of the Company's choice. These viewings will be documented to file.

41.3. Any member charged with an offense involving discipline shall be notified in writing of such charges and the discipline to be administered, as soon as possible but in no event later than fifteen (15) work days from the date the Company became aware, or reasonably should have been aware, of such offense. In the event such member disagrees with either the offense with which charged or the discipline to be rendered, he shall be entitled to a hearing on such charge. The hearing shall be held within thirty (30) work days of the date the employee is charged and shall be at a designated time and date at the home division of the employee. A member shall have the right to be represented by officials of the Union. Should the Union not be represented at the hearing, the Union shall be furnished a copy of the Company notes of such hearing. A decision by the Company

shall be rendered in writing within ten (10) work days, from the date of conclusion of such hearing, with a copy to the Presidential Business Agent of the Union.

41.4. All disputes, differences and grievances shall be handled in accordance with the following procedure.

41.4(a). The first step of the grievance procedure in cases not dealing with discipline will be a meeting between the employee, and their immediate supervisor, within five (5) work days of the occurrence with the objective being resolution of the issue at hand. A union representative will be present either in person or by phone if requested by the employee.

41.4(b). If the grievance cannot be settled in an oral meeting between the employee, Union representative and immediate supervisor, within fifteen (15) work days from the date upon which the grievance occurred, or last occurred, the aggrieved Employee may file a written statement of grievance addressed to the Employee's home terminal supervisor, as designated by the Company. The written grievance shall be in such detail as to identify the nature of the grievance, the name of the aggrieved Employee and the date and place of the occurrence.

41.4(c). Within ten (10) work days after the written grievance has been filed, the local Union representative shall be accorded a conference with the Company representative designated to handle grievances at the Company Corporate Office, if requested in writing by the Union. Upon mutual consent a telephone hearing may be conducted.

41.4(d). The Company representative shall render a written decision within ten (10) work days from the date of receipt of the written grievance, or within ten (10) work days following the conclusion of the conference, if such conference is held. Such decision shall be mailed to the Local Union President, by Certified Mail, Return Receipt Requested, with a copy to the aggrieved Employee and local designee.

41.4(e). If an Employee is not satisfied with the decision of the Company representative as referred to in (c) above, the matter may, within ten (10) work days after receipt of such decision, be appealed to the Company President or his designee by Certified Mail, return receipt requested, with copy to supervisor who denied the grievance.

41.4(f). The Chief Operating Officer or his designee, shall render a decision within ten (10) work days following the receipt of the written appeal as referred

to in (d) above. Such decision shall be sent to the Local Union President via Certified Mail.

41.4(g). If the Union is not satisfied with the decision, it may submit the matter to arbitration as herein provided.

ARTICLE 42

ARBITRATION. It is understood and agreed that the Union may proceed directly to arbitration following the decision from the Company in Article 41.3. In case of any disagreement as to proper meaning or application of any provision of this Agreement, the matter shall be referred to final and binding arbitration in the following manner:

42.1. Failing the settlement of any grievance, or unsatisfactory decision in a discipline case, such grievances or decisions may be submitted to arbitration provided the aggrieved party files for arbitration by notifying the Federal Mediation and Conciliation Service and Company within thirty (30) days following receipt of the Company's decision on a grievance appeal or disciplinary hearing.

42.2. The party requesting arbitration shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) arbitrators to the Company and the Union, from which one (1) shall be selected as the impartial arbitrator. The Company and Union shall equally share the cost of securing the list of arbitrators.

42.3. Within ten (10) work days following receipt of the list of arbitrators, the Union and Company representatives shall alternately strike one (1) name until one (1) name remains, with the first strike to be determined by the "toss of a coin." The remaining name shall be the impartial arbitrator.

. . .

42.7. TIME LIMITS. It is agreed that either party hereto failing to comply with the time limits outlined in the Discipline-Suspension-Discharge-Grievance procedures and Arbitration Procedures, shall forfeit its case, unless the parties agree in writing to extend or waive the time limits. It is understood that, all references to time limits herein shall exclude Saturdays, Sundays and Holidays as listed herein.

The following is a summary of the procedures 1) that led to the grievant's discharge, 2) that were used by the Union to

grieve the discharge, and 3) that were used by the parties in processing the grievance. January 5, 2007, the date of the event that led to the grievant's discharge, was a Friday. David G. Reigstad, a Dispatcher, testified that, after he learned that the grievant had missed a passenger at the Big Lake stop, he called the grievant by cell phone as the grievant was about to arrive in downtown Minneapolis -- about forty to forty-five minutes from Big Lake. Reigstad asked the grievant if he had gone into the Super America station to ask the agent if there were any passengers to pick up, and the grievant acknowledged that he had not. A short time later, at 6:53 p.m., Reigstad sent an email to Gregory A. Rutherford, then the Operations Manager, informing him that the grievant had missed a passenger at Big Lake and, when questioned by Reigstad, had said that he did not get out of the bus to check with the agent for passengers.

Rutherford testified that on Friday, January 5, 2007, the grievant had called him to arrange a meeting for Monday, January 8, at which the grievant wanted to discuss equipment safety. On Sunday, January 7, the grievant called Rutherford and told him that, because of child-care scheduling, he wanted to postpone till Tuesday, January 9, the equipment-safety meeting that had been set for Monday, January 8, and Rutherford agreed to do so. Rutherford did not see Reigstad's email of the previous Friday, in which he informed Rutherford that the grievant had missed a passenger at Big Lake, until Rutherford arrived at his office on the morning of Monday, January 8, 2007.

When the grievant arrived for the postponed equipment-safety meeting on the morning of Tuesday, January 9, Rutherford informed him that he wanted to discuss another matter and that the grievant might want to have Union representation during the meeting. The grievant left Rutherford's office for a short time, went into the shop and returned with a Union steward, Roy Hamilton. During the meeting that followed, four people were present -- the grievant, Hamilton, Rutherford and Linda Gill, a Human Resources representative of the Employer. At the meeting, Rutherford testified that he explained the situation, that he had a report that the grievant had missed another passenger the previous Friday, at the Big Lake stop and that the grievant conceded that he had not gone into the stop to check for passengers with the agent. Rutherford told the grievant that, because of his poor record of discipline for similar incidents and because he had been given a final warning the previous October, he was discharging him.

On the same day, January 9, 2007, Rutherford sent to Richard Davis, President of the Union, the following letter:

Please be advised that Joe Zeilbeck's employment with Jefferson Lines has been terminated effective January 9, 2007.

On January 25, 2007, the Employer received a grievance dated the previous day, in which the grievant made the following allegations:

1. [That he was discharged unreasonably.]
2. Company did not notify me in writing about my act needing discipline action. Article 41.3.

3. Company did not notify me about meeting, or that I was going to need Union representation for a discipline meeting. Article 41.3.
4. Company failed to send me or Mr. Davis an answer from meeting on 1/7/07 [sic] within 10 days (Art 41.3) constituting in [sic] forfeiture of case (Art 42.7).

On February 7, 2007, Davis sent Rutherford a letter, stating:

The Company has forfeited its case by not responding to hearing. Reference Joe Zeilbeck grievance dated 1-24-07. The Company has not requested extension of time limits. The Company has forfeited its case in not responding to Grievance dated 1-24-07 in a timely manner. The contract requires Mr. Zeilbeck to receive a response not later than 2-7-07. . . .

Also on February 7, 2007, Rutherford sent the grievant the following letter, with a copy sent to Davis:

Re: Response to Grievance dated 1/24/07

This letter is in regards to grievance dated 1/24/07 and received by me on 1/25/07.

I have taken the opportunity to review your grievance and [your] numerous claims. In regard to your discharge, I find that your discharge was in fact reasonably construed following your painted history of similar incidents to the one discussed in the January 9, 2007 meeting. Many of your past incidents were followed by numerous conversations and formal disciplinary measures, yet again your unacceptable actions continued to reoccur.

As you are aware, a meeting was set up by you, for Monday, January 8, 2007. The meeting was then changed per your request for Tuesday morning 1/9/07. The incident was brought to my attention on 1/8/07 and since we already had a meeting set, I informed you immediately upon your arrival that there was another [issue] to be discussed on Tuesday morning. Additionally, I informed you that you may want to have a union representative at our meeting.

On January 9, 2007 a letter was sent to your union representative Richard Davis on your behalf notifying him of the outcome of our meeting stating that your employment was terminated effective 1/9/2007.

With the explanation above, I hereby deny your grievance.

On March 17, 2007, the Union sent the Employer a letter stating that "the Union is moving this grievance [and two others] to Arbitration by copy of this letter to Weston Moore [counsel to the Union] to request a panel of Arbitrators from FMCS."

On July 13, 2007, Moore requested that the Federal Mediation and Conciliation Service ("FMCS") furnish the parties a panel of arbitrators to hear the this case. On July 25, 2007, David Aarsvold, a retired Vice President of the Employer who was then still working part-time, sent Davis a letter in which Aarsvold wrote the following:

. . . This letter will serve as notice of our intent to argue that these three cases [including that of the grievant] are unable to be arbitrated since the FMCS panel picks are clearly well-beyond the thirty (30) day time limit that our contract allows as reasonable and timely.

The parties presented post-hearing affidavits, one authored by Moore and the other, by Aarsvold. Moore's affidavit states that between December, 2005, and July, 2006, the parties ordered arbitration panels from FMCS for about fifteen cases, struck names in about half of them and went to arbitration in four. Moore also states that between March and June of 2006, the parties discussed "our unused arbitration panels" and that the parties "would try to use the panels in some cases we saw coming." In addition, Moore states 1) that in late 2006 Donald Froemming administered the grievance procedure for the Employer in the absence of Aarsvold, who was on disability leave, 2) that Froemming requested copies of the unused arbitration panels, and 3) that, on December 4, 2006, Moore sent Froemming the following letter [identified as Attachment D to Moore's affidavit]:

I apologize for the delay responding to your request for copies of the available arbitration panels. Enclosed are copies of those panels that Mr. Aarsvold and I ordered for use in the settlement of any grievances that could not be resolved.

Moore's affidavit states:

The issues Mr. Froemming and I thought were going to be arbitrated in December, 2006 got pushed to the side a month later when three (3) discharges occurred in January, 2007, including the discharge of Mr. Zeilbeck. These discharges reached the point of going to the start of the arbitration process in March, 2007. It was also in March, 2007, that Mr. Froemming resigned from Jefferson.

Mr. Froemming left Jefferson and Mr. Aarsvold returned as a consultant, but was off-duty because of hip surgery. I questioned Mr. Davis, the Union President, concerning who the new contact person would be for the arbitration process. Mr. Davis informed me in early March, 2007 that he had spoken to Mr. Rutherford who said he was not sure.

In March, 2007 I still had five (5) arbitration panels to be used and it had only been three (3) months since I had confirmed with Mr. Froemming that we were going to use these panels. (Attachment D) That was the situation when Mr. Davis sent his notice to Jefferson in March, 2007 that he intended to arbitrate the discharge of Mr. Zeilbeck.

I learned of Mr. Aarsvold returning to duty at Jefferson sometime between April and June, 2007. During this period, there was an informal email exchange between Mr. Aarsvold and me concerning who would now be the arbitration contact person and if he still wanted to use the "old panels." Although I have not been able to locate a copy of the email exchanges between Mr. Aarsvold and me, I do recall that there was some obstacle to us being able to readily proceed with the selection of an arbitrator from the "old panels." I also recall that Mr. Aarsvold needed me to send him some additional information that would allow him to continue the process of using the "old panels." I agreed to whatever it was he requested, but soon after this email exchange between Mr. Aarsvold and me, another discharge occurred and moved to the arbitration stage in July, 2007. This made a total of four discharges ready to move to a hearing.

In July, 2007, given that there were now four (4) discharges to be heard at arbitration, plus the confusion and lack of coordination concerning the use of the "old lists," and because Scott Allen reentered the process as Jefferson's counsel, I elected to abandon the idea and

hassle of using the "old lists" and submitted a request to FMCS for four (4) new panels to be used in connection with Mr. Zeilbeck's discharge and the three other pending arbitrations. All four (4) arbitration panels were sent by FMCS to Dave Aarsvold at Jefferson on July 13, 2007.

In response to Moore's post-hearing affidavit, Aarsvold's affidavit states:

In his affidavit, Mr. Moore makes references to Jefferson and the Union using "old arbitration panels" for the grievance of Mr. Zeilbeck. I do recall some general discussion with Mr. Froemming and Mr. Moore, before 2007, concerning the possibility of using unused arbitration panels for future cases. However, I have reviewed Jefferson's files, checked with Mr. Froemming, and been unable to find any evidence that Jefferson ever received the document (dated December 4, 2006) submitted by Mr. Moore as Attachment D to his affidavit, or any referenced "old" arbitration panels. In addition, at no time prior to July of 2007, do I recall receiving any communication, written or verbal, from Mr. Moore or Mr. Davis concerning arbitration panels, old or new, for the grievance filed on behalf of Mr. Zeilbeck. If I had any such discussion with Mr. Moore or Mr. Davis on using "old" arbitration panels for Mr. Zeilbeck or other employees, I would have requested the panel, which I never received. Given the absence of any such panels or agreements, I sent the letter of July 25 (Employer Exhibit 14 which I identified at the hearing) stating Jefferson's intent to argue timeliness. In his letter to me after my July 25 letter, Mr. Moore did not raise any claim about having an agreement or understanding with me or others at Jefferson on using old panels for the grievance filed on behalf of Mr. Zeilbeck. (See page 4 of Attachment C from Mr. Moore's affidavit.) Just as Mr. Moore states in his affidavit that he is unable to locate any email exchanges between us on this issue of using old panels for Mr. Zeilbeck, I am unaware of any such emails. . . .

Aarsvold and Moore both state in their affidavits that the parties have not always met the ten day time limit for striking names from an arbitration panel. Moore's affidavit states that the instant case is the only one in which the Union has failed to meet the thirty-day time limit for requesting a panel of arbitrators from FMCS, but Aarsvold's affidavit cites another such case.

DECISION

The parties make the following primary arguments. The Union argues that the labor agreement requires the Employer to give written notice of prospective discipline to the Union and to the employee whose discipline is intended, and it argues that the Employer failed to do so in the present case. The Union also argues that the Employer failed to provide the grievant with the due process requirements established by Section 41.3 of the labor agreement.

The Employer argues that, except in one respect, it has fully complied with the procedural requirements established by the labor agreement; it concedes that the notice given to the grievant of its intention to impose discipline was oral and not written, as required by Section 41.3 of the labor agreement. It argues, however, that the failure to put the notice in writing was harmless error that did not deprive the grievant of due process. The Employer also argues that the grievance should be dismissed because the Union did not follow the requirement of Section 42.1 of the labor agreement, which provides that an adverse decision about discipline "may be submitted to arbitration provided the aggrieved party files for arbitration by notifying the Federal Mediation and Conciliation Service and Company within thirty (30) days following receipt of the Company's decision on a grievance appeal or disciplinary hearing." The Employer urges that, in the present case, the Union has forfeited the contract right to challenge the grievant's discharge through arbitration by delaying its request

to FMCS for a panel of arbitrators until July 13, 2007 -- about five months after the Employer's decision to discharge the grievant. The Employer cites Section 42.7 of the labor agreement, which provides that a party that fails to comply with the time limits established by Articles 41 and 42 "shall forfeit its case, unless the parties agree in writing to extend or waive the time limits."

I resolve the parties' arguments by the following additional findings of fact and rulings. Article 41 establishes two procedures for challenging actions of the Employer. For discipline cases, the chief means of challenge are established in Section 41.3 -- though as is indicated by the parties' letters of February 7, 2007, they agree that, after the initiation of a grievance over discipline, the grievance processing steps established in Section 41.4(b), (c) and (d) apply as well. For non-discipline cases, the chief means of challenge begins with Section 41.4(a).

Below, I repeat Section 41.3, and, thereafter, interpret and applying it to the facts in this discipline case:

41.3. Any member charged with an offense involving discipline shall be notified in writing of such charges and the discipline to be administered, as soon as possible but in no event later than fifteen (15) work days from the date the Company became aware, or reasonably should have been aware, of such offense. In the event such member disagrees with either the offense with which charged or the discipline to be rendered, he shall be entitled to a hearing on such charge. The hearing shall be held within thirty (30) work days of the date the employee is charged and shall be at a designated time and date at the home division of the employee. A member shall have the right to be represented by officials of the Union. Should the Union not be represented at the

hearing, the Union shall be furnished a copy of the Company notes of such hearing. A decision by the Company shall be rendered in writing within ten (10) work days, from the date of conclusion of such hearing, with a copy to the Presidential Business Agent of the Union.

The meeting of January 9, 2007, was an investigatory meeting, preliminary to discipline, among the grievant, a Union steward and Rutherford and Gill, management representatives. In that meeting, Rutherford continued his investigation, which had begun the previous day as he received reports about the missed passenger at the Big Lake stop. He obtained the grievant's account of what had happened and then decided that, in view of the grievant's previous record, he should be discharged. Rutherford notified the grievant orally of that decision at the end of the meeting of January 9, 2007, and he then sent a letter to Davis, President of the Union, informing him of the discharge. This letter provided written notice to the Union of the decision to discharge the grievant, but it did not describe the "charges," i.e. the allegations upon which the discharge was predicated, and it was not given to the grievant. Thus, the letter to Davis of January 9, 2007, failed to meet the stated requirements of the first sentence of Section 41.3 that a discharged "member" receive written notice -- a notice that is to describe the discipline and the charges upon which the it is based. The evidence shows that, although the grievant did not have such a notice in writing, he had oral notice of his discharge and of the charges upon which it was based.

The second and third sentences of Section 41.3 give the employee who is disciplined the right to a hearing to be "held within thirty work days of the date the employee is charged"

if he or she "disagrees with either the offense with which charged or the discipline to be rendered." The right to such a hearing is one that must be invoked by the employee. In the present case, the grievant did not request such a hearing. Instead, he challenged the discharge by initiating a grievance on January 24, 2007.

The final three sentences of Section 41.3 establish the employee's right to be represented at the kind of hearing described in the second sentence and the obligation of the Employer to make a written decision about the discipline within ten work days from the conclusion of the hearing. Because there was no request for such a hearing in the present case, those three sentences do not apply.

Though Davis' letter of February 7, 2007, alleged that the Employer had missed the ten work day time limit for response to the grievance dated January 24, 2007, the Union does not argue here that Rutherford's response by letter of the same date failed to meet that time limit. Indeed, the Employer argues that it had until February 8, 2007, to make that response.

Section 42.1 of the labor agreement requires that, in order to submit unsatisfactory decisions of the Employer to arbitration, the "aggrieved party" must file for arbitration by notifying the Employer and FMCS "within thirty (30) days following receipt of the Company's decision on a grievance appeal or disciplinary hearing. In this case, the Union sent the Employer a letter on March 17, 2007, stating that "the Union is moving [this grievance] to Arbitration by copy of this letter to

Weston Moore to request a panel of Arbitrators from FMCS." Though this letter was sent more than thirty calendar days after Rutherford's adverse response to the grievance of February 7, 2007, the Employer has not argued that the March 17, 2007, letter of the Union was untimely.*

The post-hearing affidavits of Moore and Rutherford, even if given an interpretation most favorable to the Union, do not show an agreement to use the "old panels" for the selection of an arbitrator in the present case. At best, they show a general proposal to use the old panels, but they do not show notice to the Employer that the Union proposed to use one of them for this case. It appears that the requirement of Section 42.7 that there be an agreement in writing for an extension or waiver of the thirty day time limit for notice to FMCS was not met.

On July 25, 2007, the Employer informed the Union that it intended to assert as a defense that the request for a panel of arbitrators in this case, made on July 13, 2007, was untimely.

Thus, it appears that both parties failed in some respect to comply fully with the procedures established by Articles 41 and 42. The Employer, though it notified the grievant orally of his discharge and the "charges" on which it was based, did not do so in writing, as required by Section 41.3 of the labor

* I note that this specification of a time limit of thirty days is the only time limit in Articles 41 and 42 that is set in "days," while the others set time limits in "work days." It may be that the parties have an understanding that this time limit should also be interpreted as specifying work days rather than calendar days and have demonstrated that understanding by practice.

agreement. The Union, though it notified the Employer on March 17, 2007, that it intended to proceed to arbitration, failed to complete the notification process -- notice to FMCS by request for an arbitration panel. It did not make that request until July 13, 2007, long after the thirty day time limit specified in Section 42.1.

Each of the parties makes an argument that any deficiency found in its compliance with the procedural requirements of the labor agreement should not be viewed as fatal to its case. Thus, the Employer argues that, because the grievant had oral notice informing him of his discharge and the charges on which it was based, he suffered no adverse effect from the lack of such a notification in writing. The Union argues 1) that a failure of timely completion of the notice requirements of Section 42.1 should not bar arbitration where there is a reasonable excuse or other justification for the delay. It also argues that in the past the parties have "accepted a loose interpretation of the contractual time limits," by not requiring strict compliance with the ten work day time limit for striking arbitrators names after a panel is received.

Though each of the parties argues for non-forfeiture of its position for any deficiency in its compliance with procedure, neither is willing to afford the other the same relaxation of strict compliance.

I find some merit in the arguments of each party that it should not suffer forfeiture of its position because of these procedural defects. I also find, however, that there is no good basis for relaxing the procedural requirements to cover the

deficiency of one party, but not the other. In this circumstance, I can find either that the procedural failure of both parties should determine the outcome of the case or that the procedural failure of neither party should determine it.

I accept the arguments of both parties that the defect in procedure for which it is responsible should not affect the outcome of the case. In other words, I accept the Employer's argument that the grievant, who, because he had oral notice of his discharge and the charges on which it was based, suffered no adverse effect from the lack of written notice so informing him and therefore, that that defect should not nullify the discharge. I also accept the Union's argument that, in the circumstance of confusion about the use of old panels, the failure to request a panel for this case until July 13, 2007, should not nullify the Union's right to arbitrate the grievance.

In the absence of such a nullifying procedural defect, I rule that neither the discharge, the post-discharge procedure, the grievance nor the right to arbitrate the grievance was procedurally defective in a significant way. Accordingly, I conclude that the discharge met the substantive and procedural requirements of the labor agreement.

AWARD

The grievance is denied.

March 8, 2008

Thomas P. Gallagher, Arbitrator